U.S. Department of Labor

Office of Administrative Law Judges
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In the Matter of:	:	
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DAVID EDDIS and	:	Dated: January 9, 2001
GERALD EDDIS	:	
Complainants	:	Case No.: 2000-NQW-0001
	:	
v.	:	
	:	
LB&B ASSOCIATES, INC.	:	
Respondent	:	
	:	
and	:	
	:	
ADMINISTRATOR,	:	
WAGE AND HOUR DIVISION	:	
Party-In-Interest	:	

David Eddis, *pro se*
Gerald Eddis, *pro se*

Mary Rieser, Esq.
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Philadelphia, PA
For the Party-In-Interest

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Washington, DC
Benjamin Thompson, Esq.
Jennifer Miller, Esq.
Raleigh, NC
For the Respondent

Before: JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER[1]

This case arises under Executive Order 12933, *Nondisplacement of Qualified Workers Under Contracts*, and the regulations implementing that order found at 29 C.F.R. Part 9. In April 1999 the General Services Administration ("GSA") issued Solicitation No. GS-03P-99-AZC-0017 to procure a contractor for maintenance at the William J. Green, Jr. Federal Building and the James A. Byrne Courthouse (the "Byrne/Green Complex") (GX 2, at 1, 13). LB&B Associates, Inc. ("Respondent") submitted a proposal in response to the solicitation, and was awarded Contract No. GS-03P-AZC-0017 on August 27, 1999 (GX 2, at 1). Following the award of the contract, Respondent selected employees to work at the site. Although it interviewed all the incumbent maintenance workers, the Respondent did not hire Complainants David or Gerald Eddis, who are brothers. Subsequently, the Eddises filed a complaint with the United States Department of Labor on October 19, 1999, claiming that Respondent had failed to comply with Executive Order 12933 and 29 C.F.R. Part 9 when it did not hire them (GX 6, at 1).

On May 30, 2000, the Regional Administrator of the Wage and Hour Division notified Respondent of his determination that it had violated Executive Order 12933. Respondent filed a timely appeal of that determination, which was docketed and assigned to me on June 19. Robert Henninger entered his appearance on behalf of the Complainants and Benjamin Thompson and Daniel Johnson entered their appearances on behalf of Respondent on June 26, 2000. On July 6, 2000, the *Notice of Hearing* scheduling the case to be heard in Philadelphia, Pennsylvania on September 20, 2000 was issued. One month later, on August 21, Mr. Henninger informed me that his firm was not authorized to represent the Complainants, and withdrew his appearance in the matter. In early September, my law clerk spoke with one of the Eddis brothers, who affirmed that they were choosing to appear *pro se* and were not intending to present a case. Rather, they were relying on the Wage and Hour Administrator to present a case on their behalf. Also in early September, Respondent and the Administrator filed their prehearing statements, and Linda Henry entered her appearance on behalf of the Administrator. On September 15, 2000, Respondent filed a motion to dismiss due to the Complainants' failure to file a pre-hearing statement. That motion was denied at the start of the hearing (TR 7-10).

The hearing was held on September 20-22, 2000 in Philadelphia. The Complainants reiterated that they were comfortable proceeding without representation and allowing the Administrator to take a lead role in the case (TR 5-6). Subsequently, the Administrator and Respondent presented their cases. At the conclusion of the hearing, I closed the record, and set November 22, 2000 as the deadline for filing post-hearing briefs (TR 598, 600). Both the Administrator and Respondent timely filed their briefs.

At the hearing, Respondent moved to have pages 120-290 of Government's Exhibit 2,

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[1] Citations to the record of this proceeding will be abbreviated as follows: GX–Government's Exhibit; RX–Respondent's Exhibit; TR–Hearing Transcript.

Respondent's technical proposal in response to the solicitation of bids for the contract at issue in this case, placed under seal. Respondent contends that the technical proposal consists entirely of proprietary information which is barred from disclosure by the Federal Acquisition Regulation and is also exempt from disclosure under Exemption 4 of the Freedom of Information Act, 5 U.S.C. §552(b)(4). Respondent indicated at the hearing that it would file a written motion after the hearing, and did so at the time it filed its post-hearing brief. The Administrator, although opposing the motion at the hearing, did not file a written response to Respondent's post-hearing submission.

I find that Respondent's technical proposal is information which would not customarily be released to the public and would be exempt from disclosure under Exemption 4 of the FOIA. Accordingly, pages 120-290 of Government Exhibit 2 are placed under seal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background

Complainants David and Gerald Eddis[2] were maintenance workers at the Byrne/Green Complex for 16 years and 10 years, respectively (TR 25, 105). David is a high school graduate and had been a member of the United States Army before he started working at the Byrne/Green complex in 1983 (TR 24-25). Initially he performed building maintenance, but was promoted to engineer toward the end of 1983 after receiving his City of Philadelphia Grade A Engineer's License (TR 25). After his first employer's contract expired, he was hired by Halifax, the contract successor, and worked for that company for three and a half years (TR 26). Halifax promoted him to lead engineer within his first year of working for the contractor (TR 26). As lead engineer, he oversaw the workforce, performed inspections, inspected other employees' work, attended meetings with the government, and responded to tenants' complaints (TR 26-27). David was hired by Halifax's successor contractors, and maintained the position of lead engineer for eight years under several different government contracts (TR 36-37). David was lead engineer when Respondent's predecessor contractor, Fluidics, was awarded the contract at the Byrne/Green Complex in September 1996. He resigned from that position in September 1997 (TR 36; GX 1). David testified that he resigned as lead engineer because Fluidics did not want him to simultaneously hold the positions of union shop steward and lead engineer. He asserted that Fluidics delegated his authority as lead engineer to an employee under him, prompting his resignation (TR 38). However, soon after he resigned as lead engineer he also resigned his position as shop steward, and the lead engineer who succeeded him in that position, Eric Fritz, became shop steward (TR 536). This sequence of events casts doubt on David's statement that he resigned as lead engineer due to Fluidics' concerns about his holding both positions. Because his pay rate decreased when he resigned as lead engineer, he transferred to a night shift, which paid more than the day shift (TR 39). He worked on this shift until his employment ended in

[2] For the sake of convenience, David and Gerald Eddis will be referred to throughout this decision by their first names only. No disrespect is intended.

September 1999.

During his employment at the Byrne/Green Complex, only one employer took any disciplinary action against David (TR 40). This occurred in late January 1997, when Fluidics' issued a warning for non-performance of work. David filed a grievance, documented eight hours of work on the contested day, and the project manager withdrew the warning. No other employer took disciplinary action against David in his 16 years of employment at the Byrne/Green Complex (TR 40).

During his tenure at the Byrne/Green Complex, David developed a favorable reputation with some associates and received two letters of praise from former employers in the late 1980's (GX 21; GX 22). The Administrator presented the testimony of GSA building manager Kathy Peek, GSA inspector Dennis Miller, and Eric Fritz, David's successor as lead engineer, all of whom thought highly of David's work and noted that they had never heard any complaints about him (TR 173-78, 194-95, 271-73).

Gerald also has a City of Philadelphia Grade A Engineer's License (TR 140). He began working at the Byrne/Green Complex in July 1989 (TR 105). For the first several years, he performed preventative maintenance work and utility work.[3] After he obtained his engineer's license, he was promoted to maintenance mechanic (TR 108). When Fluidics took over the contract in 1996, it hired Gerald to do preventative maintenance work (TR 112). Fluidics promoted Gerald to operating engineer in May 1999 (TR 140).

Like his older brother, Gerald had a work history relatively free of disciplinary actions and complaints. The only notable employment problems with Gerald concerned his absence from work in 1998. That year, Gerald was in a car accident, rupturing disks in his neck and lower back (TR 114-15). He took significant amounts of time off work, and some of his leave requests were not approved (TR 115-16). Fluidics issued four warning slips to Gerald, which he contested (RX 18). As a result, two notices were withdrawn and two remained (TR 158-59). Other than these incidents, no employer took disciplinary action against Gerald (TR 117).

Also like his older brother, Gerald developed a favorable reputation with some coworkers and GSA personnel. Mr. Miller complimented him as one of the best preventative maintenance workers (TR 174). Mr. Miller and Ms. Peek testified that they never heard complaints about him (TR 178, 198). Mr. Fritz also testified that Gerald was a competent worker, particularly praising his preventative maintenance work, and stated that he had no complaints about Gerald (TR 267).

In April, Fluidics hired Lee Davis as project manager at the Byrne/Green Complex. Mr. Davis worked a different shift than the Eddises, so he did not observe them at work and had only occasional physical contact with the Complainants (TR 530, 544). He reviewed their

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[3] Gerald testified that when the second contractor he worked for took over the contract, he "took a step down" and was hired as a utility worker because he needed more experience (TR 107-08).

performance by looking through the engineering log book, work order forms, tour sheets, and other paperwork the workers completed (TR 530, 532). Over the spring and summer that he worked for Fluidics, Mr. Davis developed an unfavorable opinion of the Complainants (TR 532). He testified that they failed to complete work orders and tour sheets, that two other employees complained about them, and that they failed to make repairs about 25% of the time, although he only mentioned one specific repair that David failed to complete and one that Gerald failed to complete (TR 532-34).

In his testimony, Mr. Davis seemed most disturbed that the Complainants were not "team players" because they took vacation time in the summer or fall of 1999 (TR 534). At the end of Fluidics' contract, the workers had to complete an end of contract audit (TR 156, 534). To ensure that it was completed, Mr. Davis asked all of the workers to forego their vacation time (TR 535). He testified that he told the workers that they could take their vacations after they completed the audit, or, if they did not use their vacation time, they would get paid for the time (TR 535). However, he admitted that under the union contract the workers were entitled to be paid for their unused vacation time, so he had not actually offered the workers a benefit for foregoing their vacations (TR 554). Mr. Davis testified that the Complainants used some of their vacation time in 1999 despite his request, and that it caused him to bring in extra people to finish the audit. He admitted that he probably would have had to bring in extra workers regardless of whether the Complainants took their vacations, but maintained that he would not have had to bring in as many workers (TR 535). He also admitted on cross-examination that several other employees took their vacation time in the summer or fall of 1999, including Eric Fritz, Fluidics' chief engineer (TR 279, 542). Finally, neither Complainant used all of his available vacation time in the summer and fall of 1999, and Mr. Davis himself approved all of the vacation time taken by the Complainants (TR 542, 546-547; GX 52).

Mr. Davis never spoke with the Complainants regarding his dissatisfaction with their performance, and both Complainants testified that they were unaware of any dissatisfaction with their performance (TR 97, 536). Mr. Davis testified that he did not speak with the Complainants but instead spoke with Mr. Fritz because "it's a union shop and you go through the union leader" (TR 536). He also never wrote up the Complainants, although he had the power to do so (TR 543). He testified that he did not write them up because he "had experience that if you write people up near the end of the contract you get a slow down and I couldn't afford a slow down," and because Jack Dobrowolsky, Fluidics' Operations Manager, instructed him not to write anyone up (TR 536, 543).

Mr. Fritz, the chief engineer under the Fluidics contract, had more contact with the Complainants than Mr. Davis, and conveyed a very different opinion of their work (TR 261, 543). He testified that Gerald was qualified and competent, particularly at preventative maintenance work (TR 267). He expressed a very high opinion of David's work, stating that "[w]hen Dave was on the shift, I went home relaxed. I didn't have to worry that my building . . . was in good hands" (TR 272). He also testified that both Complainants always filled out the log book, completed their tour sheets consistently, and filled out their productivity sheets at the same rate as

the other employees (TR 270, 280-82). He further stated that neither Complainant consistently left work for other employees to perform, noting that sometimes the parts were not available to complete the work and that sometimes employees did not have time to complete the work (TR 284).[4] He had no perception that the Complainants were not "team players," testifying that no GSA employees or building tenants ever complained about their attitudes (TR 273-74). Further, Mr. Fritz had the responsibility of approving or disapproving leave based on whether he would have enough manpower to run the building in the employee's absence; he testified that he always approved the Complainants' leave, and they never left him shorthanded (TR 275-78; GX 52). Still, despite Mr. Fritz's favorable opinion and Mr. Davis's decision not to notify the Complainants of his dissatisfaction with their performance, the fact remains that when LB&B signed a contract with GSA, Mr. Davis maintained a low opinion of the Complainants' performance.

Respondent was awarded the maintenance contract for the Byrne/Green Complex on August 27, 1999 (GX 2, at 1). However, the contract as signed did not incorporate Executive Order 12933 or Federal Acquisition Regulation ("F.A.R.") § 52-222.50 (*see infra*) (GX 2; TR 311).[5] Respondent was to begin performance on the contract on October 1, 1999 (GX 2). Within several days of the contract signing Mark Crosby, a Business Agent for Local 835 Operating Engineers, contacted Respondent's Chief Operating Officer, Edward Brandon, regarding the employment application form Respondent had supplied to the Fluidics employees seeking work on the new contract (TR 239-41, 389). Mr. Crosby was concerned with two parts of the application which stated that the contract would be one of employment at will (TR 241; GX 46, at 1, 4). He told Mr. Brandon that "the right of first refusal" applied to the contract, and protected the union employees, but did not specifically mention the Executive Order (TR 242). He testified that Mr. Brandon responded that the right of first refusal did not apply to the contract or protect the employees, and that LB&B had no obligation to abide by it (TR 243). After his conversation with Mr. Brandon, Mr. Crosby contacted the union's attorney, who informed Mr. Brandon in a letter dated September 3, 1999 that Executive Order 12933 applied to the contract (TR 247; GX 53). LB&B responded that the Executive Order did not apply to their contract with GSA (TR 249).

While these contacts were taking place, Respondent began preparation for performance of the contract. In early September, Respondent and GSA held a post-award conference. Present at the meeting were Dan Langan, GSA's contracting officer; Jim Bagley and Kathy Peek, GSA's building managers; Dennis Miller, John Thompson, Joe Wittington, and Mike Martino, GSA

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[4] Both parties presented witnesses who asserted that Fluidics' maintenance team was understaffed (TR 115, 242, 278, 418, 421). In fact, LB&B hired four additional workers when it took over the contract, and Mr. Fee, Respondent's employee, stated that he would not have been comfortable working in the complex with only seven employees (TR 421).

[5]The Federal Acquisition Regulation is codified at Title 48 of the Code of Federal Regulations.

building inspectors; Ed Brandon; John Civitelli, Respondent's proposal manager; Tracy Griffith, Respondent's lead engineer on the operations management team; and Patrick Fee, Respondent's facility services division manager (TR 389-90, 587). At the meeting, they discussed the incumbent personnel under the Fluidics contract (TR 388, 390).

At the time of the meeting, Mr. Fee did not know any of the GSA personnel or the Fluidics workers (TR 392). He testified that he recalled GSA personnel being generally concerned with the qualifications of the Fluidics workers (TR 393). He took notes at the meeting regarding the qualifications and performance of the incumbent personnel, although he did not recall who made the comments he recorded (TR 391; RX 10). Next to David's name, Mr. Fee wrote "Most Qualified," "no good attitude," and "was lead engineer" (RX 10). He recalled that GSA personnel said that David was the most qualified of the two brothers, but he did not have a good attitude since he had been demoted from lead engineer (TR 396). He also had plus and minus signs next to David's name, which he said indicated that GSA seemed to express more negative than positive opinions of him (TR 397). Next to Gerald's name, Mr. Fee wrote "gets dirty," "attendance," "good," and "law suite [sic] emotional stress" (RX 10). He testified that GSA personnel stated that Gerald was "not afraid to get dirty, but they said there was an attendance problem and I underscored it because they said it was a big deal. Some people said that he was good, but that he seemed to be more concerned regarding some lawsuit regarding emotional stress than in performance" (TR 396). He also wrote a plus and minus sign next to Gerald's name, indicating that there were some positive and some negative thoughts about him (TR 397).

Mr. Miller and Ms. Peek were also present at the meeting and testified on behalf of the Complainants. Mr. Miller stated that he thought highly of both Complainants' performance, and that no one from GSA told Respondent that it should not hire either Complainant (TR 174-80). However, he also admitted that he did not clearly remember what was discussed at the meeting (TR 180). Ms. Peek recalled discussing the Fluidics employees generally, and recalled joking that Gerald always looked dirty and that "[y]ou could tell that he was getting into his work," but testified that she did not remember any negative comments being made about the Complainants at the meeting (TR 210). However, she also admitted that she had been preparing to leave GSA and did not focus intently on the meeting or take care to remember all the details of it (TR 226).

Soon after this meeting Robert Evans, Respondent's corporate recruiter, introduced himself to Mr. Davis (TR 538). He had a typed copy of Mr. Fee's meeting notes with him when he met Mr. Davis (TR 573; RX 6). Mr. Evans asked Mr. Davis who on his staff he would keep and who he would terminate if he were making the decision. Mr. Davis testified, "I told him I would hire everyone except for the two Eddis brothers" because "they abused their time and I didn't think they would be qualified for the job" (TR 538-39). Mr. Evans took his own notes over Mr. Fee's notes, and wrote "no" next to Gerald's name and placed a check mark next to David's name (RX 6). He did not ask Mr. Davis for any documentation of work performance to verify his statements (TR 577).

Around September 20, Respondent hired Frank Carbone as the Project Manager at the Byrne/Green Complex (TR 450). He and Mr. Griffith, who was to be his lead engineer, conducted the interview and hiring process on Respondent's contract.[6] Mr. Fee testified that he left the hiring process entirely to Mr. Carbone and Mr. Griffith, but noted, "I could have vetoed whatever they did because I'm the Division Manager" (TR 418). Mr. Carbone testified that Mr. Fee had input on the hiring decisions, although his memory was vague and his testimony was unclear regarding specifics of the input (Tr 469-74). Mr. Evans also spoke with GSA and Fluidics personnel and reported back to Mr. Carbone and Mr. Griffith (TR 587). Mr. Carbone testified that he made his hiring decisions based on conversations with GSA personnel and Mr. Davis, review of the resumes and applications, interviews, and a diagnostic test (TR 429-30).

Mr. Carbone and Mr. Griffith spoke with Mr. Davis soon after Mr. Carbone's arrival (TR 539). Mr. Carbone explained that he spoke with Mr. Davis because he felt he had knowledge of the workers and that he could speak freely regarding his opinion of them (TR 432). Mr. Davis testified that he told Mr. Carbone and Mr. Griffith the same opinion that he expressed to Mr. Evans, and this was confirmed by Mr. Carbone (TR 433-34). In addition, he told them that the Eddises frequently failed to complete their assignments and that the Eddises had taken vacation time that summer and were not "team players" (TR 433, 539-40). Also, he stated that the project manager before him believed the Complainants' "work ethic was suspect and that they had trouble with their time and that they were written up quite a few times" (TR 540).

Despite Mr. Davis's negative report on the Complainants, Mr. Carbone continued to process their applications and conducted interviews with them. He testified that he felt the Complainants deserved an opportunity to explain their backgrounds and technical expertise (TR 434). Mr. Carbone testified that he based his interview questions on the applicants' resumes and work history to "allow them to demonstrate their abilities, things that they were responsible for operating" and asked general questions about their work ethic (TR 435). He stated that the questions were fairly consistent for all of the applicants (TR 436).

Mr. Carbone and Mr. Griffith conducted the Complainants' interviews. David testified that they asked him about his job responsibilities and asked him why they should hire him (TR 77-79). Gerald recalled that Mr. Carbone asked him to highlight his strengths and how he felt about working at the Byrne/Green Complex (TR 143-44). Neither David nor Gerald were asked specifically about Mr. Davis's negative comments regarding their performance (TR 80-81, 147-48).

In addition to the interviews, all applicants took a test designed and scored by Mr. Griffith that was meant to cover "work that an operating engineer . . . should know in order to perform duties in a facility similar to the Byrne/Green Complex" (TR 415, 445). The test was written and

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[6] Mr. Carbone noted that some interviews took place before his arrival, and he did not participate in those hiring decisions. However, he participated in the hiring contacts and decisions relevant to this case (TR 450-51).

scored on general knowledge, not based on knowledge and procedure unique to the Byrne/Green Complex and the employees' past work there (TR 497-508). Mr. Fee testified that Respondent normally did not test applicants, but that in their meeting "GSA strongly indicated that there were problems . . . related to the qualifications of individuals" (TR 397). Both Complainants testified that they were told that the test would not factor into the hiring decision, although this was not true (TR 70, 76, 142, 153). Neither Complainant scored well on the test, with David getting eight and a half marked incorrect and Gerald getting twelve and a half marked incorrect (GX 39; GX 40). However, on cross-examination Mr. Carbone acknowledged that some questions marked wrong on the Complainants' tests were actually correct, and some questions marked correct on other applicants' tests were actually incorrect (TR 496-512). Mr. Carbone also admitted that he never went over any of the results with Mr. Griffith, but relied on Mr. Griffith's scoring (TR 495). Further, at the time the test was administered, there was no answer key; rather, Mr. Griffith wrote an answer key about one month before the October 2000 hearing date (TR 494; GX 54).

Mr. Carbone testified that after the interview and test, he felt that neither Complainant was qualified to work for Respondent (TR 441-443). Based on David's low test score, Mr. Carbone felt that he exaggerated his actual knowledge during his interview (TR 438). Regarding his weighing of David's test score, Mr. Carbone stated that, "the test was basically confirming, I think, what I had been told by others and that was enough for me to say we better look for a better candidate" (TR 442). He testified that Gerald had trouble making eye contact during his interview, gave very brief answers, and seemed uncomfortable with the questions and answers he was giving (TR 440). He decided not to hire Gerald based on "the combination of the information that we had and [his] responses to the technical questions" (TR 443).

After Mr. Carbone and Mr. Griffith made their hiring decisions, they consulted with Mr. Fee, who approved their choices (TR 422). Mr. Fee stated that their reasoning was consistent with what he had heard at the post-contract award conference with GSA (TR 425). Mr. Evans made employment offers around the third week of September (TR 582-83). Respondent hired five of the seven Fluidics employees, only passing on the Complainants (TR 421-22).[7] In addition, Respondent hired five outside employees that it had recruited through newspaper advertisements, including two engineers and one general maintenance mechanic (TR 399-400, 513-14). Further, Respondent hired Mr. Davis to work on one of its projects shortly after it began performance on the Byrne/Green contract (TR 422-24).

The Complainants discovered that they were not offered employment when they came into work the last week of September and their names were not posted on the work schedule for the following week (TR 81). David testified that they immediately sought out and spoke with Mr.

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[7] Respondent hired two Fluidics employees who had scored lower than David on the diagnostic test (TR 511-12). These workers, John and Raymond Koba, were hired as general maintenance mechanics, but have performed engineer's work and received that pay rate in the past year (TR 490-92). The hiring of these two men despite their lower test scores indicates that the test did not play a major role in Respondent's hiring decisions.

Evans about their employment status, and asked him if he was aware that the workers had a right of first refusal for employment under Executive Order 12933 (TR 81-82). David maintained that Mr. Evans denied the Executive Order's applicability (TR 82). Mr. Evans did not specifically recall the conversation (TR 585).

The Eddises filed a complaint with the United States Department of Labor on October 19, 1999, claiming that Respondent had failed to comply with Executive Order 12933 when it did not hire them (GX 6, at 1). Several days later, GSA issued a modification incorporating F.A.R. 52.222-50 into Respondent's contract (GX 56). The modification went into effect on October 21, 1999 (GX 56). Thomas McGarry, GSA's East Philadelphia Field Office Manager, testified that he believed GSA had mistakenly failed to incorporate Executive Order 12933 into the original contract with Respondent (TR 311).

Subsequent to Respondent's decision not to hire him, David obtained work as a stationary engineer at the IRS Building in Philadelphia on January 10, 2000 (TR 86). He is paid $22.19 per hour, and his employer, Eastco Building Services, deducts $1.25 per hour for his pension fund and health and welfare (TR 87). The company contributes $2.80 per hour to the pension fund. He is not entitled to a vacation in his first year of employment, but will be entitled to one week of vacation time after one year of service (TR 87). He gets five sick days and four personal leave days (TR 87). Gerald obtained part-time work with Ogden (20 hours per week) as an engineer in February 2000 (TR 150, 153). After working part time at $16.28 an hour for about two months, he was picked up full time (TR 153). His pay is now $21.00 an hour (TR 150). Ogden contributes $1.50 to the pension fund, for which there are no payroll deductions (TR 152). He is not entitled to any vacation leave in his first year, although Ogden gave him eight days, and he is entitled to four days of sick leave (TR 151-52).

Fluidics granted the Complainants four weeks vacation, eight days of sick leave, and five days personal leave (TR 87; GX 1, Attachment C). The company provided health insurance, but did not deduct any money for health insurance or pension contributions (TR 88; GX 1, Attachment C). Fluidics contributed $4.50 per hour to the pension fund. At the hearing, David testified that he would accept employment with Respondent if it were offered, but Gerald stated that he would "have to think seriously about that. I may or may not" (TR 88,152).

B. Discussion

On October 20, 1994, President Clinton signed Executive Order 12933 into law. The Secretary of Labor published a notice of proposed rulemaking in response to the Executive Order in the Federal Register on July 19, 1995. *See* 60 Fed. Reg. 36,756 (1995). The final rule was published in the Federal Register on May 22, 1997. *See* 62 Fed. Reg. 28,176 (1997).

The Executive Order and Regulations address situations in which a service contract for maintenance of a public building expires and a successor contractor is awarded a contract for the same services. *See* Exec. Order No. 12933, 29 C.F.R. §9 (1997). With the purpose of protecting

"the Government's procurement interests in both economy and efficiency," the Executive Order

> generally requires that successor contractors performing building service contracts for public buildings offer a right of first refusal to employment under the contract to those employees under the predecessor contract whose employment will be terminated as a result of the award of the successor contract.

29 C.F.R. §9.1 (1997). To this end, every solicitation and contract covered by the Executive Order and Regulations must include specified clauses, published as F.A.R. 52.222-50, requiring the successor contractor to offer a right of first refusal to qualified workers. *See* 48 C.F.R. 52.222-50 (1999); 29 C.F.R. §9.6 (1997).

The regulations apply to "'building service contracts' for 'public buildings' where the contract is entered into by the United States in an amount equal to or greater than the simplified acquisition threshold of $100,000" and where the contract "succeeds a contract for similar work at one or more of the same public building(s)." 29 C.F.R. §§9.2, 9.5(a) (1997). The Regulations define "building service contracts" as those contracts for "services which are required to be performed regularly or periodically throughout the course of a contract, and throughout the course of the succeeding or follow-on contract(s) at one or more of the same buildings" that are "related to the maintenance of a public building." 29 C.F.R. §9.3(a) (1997). A "public building" is "any building owned by the United States which is generally suitable for office or storage space or both for the use of one or more Federal agencies or mixed ownership corporations, together with its grounds, approaches, and appurtenances." 29 C.F.R. §9.4(a) (1997). Federal office buildings and courthouses are specifically designated as "public buildings" in 29 C.F.R. §9.4(a) (1997).

The Regulations apply to those service employees who work in the final month of the predecessor contract and whose employment will end as a result of the contract turn-over. *See* 29 C.F.R. §9.8(a)(1) (1997). Under the Regulations, the successor contractor must offer a right of first refusal to all employees who have performed suitably on the former contract. *See id.* If the successor contractor chooses not to offer a right of first refusal to an employee, it must base its decision on specific criteria set forth in §9.8(b)(2) of the Regulations.

The Administrator asserts that Respondent was bound by the Executive Order and the Regulations when it signed the contract with GSA on August 27, 1999 despite the fact that the contract failed to include the required clauses. Further, the Administrator maintains that Respondent failed to comply with the Regulations when it did not offer the Complainants a right of first refusal of employment.

Respondent argues that it was not obligated to abide by the Regulations as of August 27, 1999 because the contract did not state that the Executive Order applied and did not include the

required clauses; rather, it only became bound by the Regulations on October 21, 1999, when GSA amended the contract. Respondent further argues that, even if it was bound by the omitted contract clauses, it acted in compliance with the Regulations when it decided not to hire the Complainants.

1. Application of the Executive Order to the Contract

Respondent stated in its pre-hearing brief and in its opening statement that GSA's contract with Fluidics was of a different nature than the contract with LB&B, *i.e.*, that the contracts were not for similar services, and that therefore Respondent's contract was not a follow-on contract subject to the Executive Order and Regulations (TR 15-17).[8] Ms. Peek testified that Fluidics' contract was a low bid contract, while Respondent's is performance-based (TR 216; GX 1; GX 2). Further, Respondent's contract required employees to be more "proactive" in quality control and identifying problems (TR 217-18). Ms. Peek also admitted that the new contract required the employees to have some new skills, although she did not consider the skills significantly different from those used under Fluidics' contract (TR 217). Further, since the Fluidics contract is three times as thick as the LB&B Contract, it can be assumed that there are some differences between them. *Compare* GX 1 *with* GX 2.

Nevertheless, Respondent's argument fails. The Executive Order simply states that contracts must be "for similar services" to apply. *See* Exec. Order No. 12933, Section 1; *see also* 29 C.F.R. §9.5(a) (1997). I find that the two contracts were for similar services, with both requiring employees to perform technical maintenance and mechanical maintenance, to respond to hot and cold calls, and to respond to emergencies (TR 337-38; GX 1, at 67, 288-314; GX 2, at 10-23). The contracts were both for operation, maintenance, and repair services, and preventative maintenance was a substantial part of both contracts (TR 305-09). The only notable difference between the two contracts was in the management of the contract, not in the work performed by the employees. A difference in management does not make the contract one for different work. Rather, both contracts require the recurring maintenance of two federal buildings, which is "similar work." Accordingly, I find that Respondent's contract was one into which the Executive Order should have been incorporated.

Even though the Executive Order should have been included in the contract, and the contract was properly amended on October 22, 1999 to incorporate F.A.R. 52.222-50, the issue remains of whether the Executive Order was applicable before the contract was amended. The Regulations provide that specified language protecting existing employees "*shall* be included in full by the contracting agency in every solicitation and contract" to which the Regulations apply. *See* 29 C.F.R. §9.6 (1997) (emphasis added). However, the Regulations do not explicitly provide for a remedy if the contracting agency fails to include the required language, as happened here.

The Respondent maintains that because the Executive Order and Regulations were not

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[8] Respondent did not make this argument in its post-hearing brief.

incorporated into the contract, and neither the Executive Order nor the Regulations explicitly state that they apply even if omitted from the contract, the Executive Order does not apply to its contract. Respondent points out that some Executive Orders or their operative regulations specifically provide that certain contract clauses are incorporated into applicable contracts regardless of whether the clauses are physically contained into the contract. *See* 41 C.F.R. §60-1.4(e). It is notable that neither Executive Order 12933 nor 29 C.F.R. Part 9 contain a provision for the application of Executive Order 12933 to contracts even if the contract does not incorporate its requirements. This omission lends support to Respondent's position that the Executive Order should not apply if omitted from a contract. However, this conclusion is not dispositive of the issue, for some executive orders have been read into contracts without any provision for their inclusion by operation of the executive order. *See S.J. Amoroso Construction Co., Inc. v. United* States, 12 Fd.3 1072 (Fed. Cir. 1993). The Administrator urges the court to do the same with the Executive Order at issue.

The Administrator asserts that the omitted language should be read into the contract by operation of law, in accordance with the *Christian* Doctrine. Alternatively, the Administrator argues that the Executive Order applied because Respondent was on notice of its application.

a. The Christian Doctrine

The *Christian* Doctrine developed out of *G.L. Christian & Assoc. v. United States*, 312 F.2d 418 (Ct. Cl.), *reh'g denied*, 320 F.2d 385 (Ct. Cl.), *cert. denied*, 375 U.S. 954 (1963), and subsequent cases interpreting it. In *Christian*, contractors brought suit against the United States after the Government unilaterally terminated a federal housing project contract. *See Christian*, 312 F.2d at 419. The contract did not authorize the Government to terminate the contract for its convenience. However, the Armed Services Procurement Regulations provided that a "standard clause shall be inserted in all fixed-price construction contracts amounting to more than $1,000" allowing the Government to terminate such contracts for convenience. *Id.* at 423. The court noted that "[t]he termination clause limits profit to work actually done" and stated that such a profit limitation "is a deeply ingrained strand of public procurement policy" which had been "a major government principle" since World War I. *Id.* at 426. The court concluded that "it is both fitting and legally sound to read the termination article required by the Procurement Regulations as necessarily applicable to the present contract and therefore as incorporated into it by operation of law." *Id.* at 426.

Courts have interpreted *Christian* to allow statutory and regulatory provisions to be read into a contract by law "only when relevant statutory or regulatory provisions are required to be included in an agency's contracts." *IBI Security Service, Inc. v. United States*, 19 Cl. Ct. 106, 109 (Cl. Ct. 1989) (citing *North Star Aviation Corp. v. United States*, 458 F.2d 64, 65 (Ct. Cl. 1972)). Further, the omitted mandatory provision must reflect a deeply ingrained strand of public procurement policy. *See S.J. Amoroso Construction Co., Inc. v. United* States, 12 F.3d 1072, 1075 (Fed. Cir. 1993); *General Eng'g & Machine Works v. O'Keefe*, 991 F.2d 775, 779 (Fed. Cir. 1993). In addition, courts have applied the *Christian* Doctrine "to incorporate less

fundamental or significant mandatory procurement contract clauses if not written to benefit or protect the party seeking incorporation." *General Engineering*, 991 F.2d at 780; *see Labat-Anderson, Inc. v. United States*, 42 Fed. Cl. 806, 856 (Fed. Cl. 1999) (reading a protest after award clause of the Federal Acquisition Regulations into a contract because the primary beneficiary of the clause was not a party to the bid protest). Thus, the *Christian* Doctrine "does not permit the automatic incorporation of every required contract clause". *General Eng'g*, 991 F.2d at 779.

In the present case, the Administrator argues that F.A.R. 52.222-50 should be read into the contract because it is a mandatory regulatory clause reflecting a significant or deeply ingrained strand of public procurement policy. By providing for a carryover workforce, the Regulations aim to protect "[t]he Government's interests in both economy and efficiency." 29 C.F.R. §9.1 (1997). The Regulations explain that a carryover workforce "minimizes disruption in the delivery of services" and "provides the Government the benefit of an experienced and trained work force." *Id.* The Administrator argues that this purpose reflects a significant or deeply ingrained strand of public procurement policy.

However, the cases applying the *Christian* Doctrine suggest that it would be inappropriate to hold that it applies to Executive Order 12933. The court in *Christian* justified incorporation because the omitted language set forth "a major government principle" under which the Government had operated for over 40 years. *Christian*, 312 F.2d at 426. The court noted that "[l]iterally thousands of defense contracts and subcontracts" had been terminated in accordance with the contract clause at issue in that case. *Id.* Similarly, a more recent case decided under the *Christian* Doctrine allowed incorporation of a Federal Acquisition Regulation requiring the Buy American Act to be included in construction contracts. *See S.J. Amoroso*, 12 F.3d at 1075-76. In that case, the court reasoned that application in law was appropriate because for 60 years the BAA had "required in express terms" that construction contracts contain provisions mandating that only American materials are used. *Id.* at 1075.

The Executive Order at issue here differs in history and consequence. As a general principle, the government has an interest in the economy and efficiency of its procurement contracts. However, this interest has no history of being protected by mandating that building services contractors offer a right of first refusal to existing workers. Rather, the Executive Order providing for this specific protection was enacted only six years ago, and the final Regulations were published only three years ago. The Regulations' history is simply too brief for their prescribed procedures to have become deeply ingrained in our government's procurement policy.

Further, the government's interest in economy and efficiency, as it is protected by offering existing employees a right of first refusal, is different from those government interests that the *Christian* Doctrine has historically been invoked to protect. The *Christian* Doctrine has typically been applied to provisions that more directly protect the government's financial interests. *See Labat-Anderson*, 42 Fed. Cl. at 855 (holding that a statutory provision is a significant strand of government procurement policy because it reduces the Government's liability in the event of a bid

protest); *General Engineering*, 991 F.2d at 779 (allowing a clause that protects the government from double payments because it "discourages the unnecessary and wasteful spending of government money"); *G.L. Christian*, 320 F.2d at 355 (noting that the policy of protecting the government from paying unearned costs is "strong and important"). In addition, "the clauses customarily encompassed by that doctrine have contained provision for compensation to the contractor for any increased costs (if not, in all cases, including profits or consequential damages)." *Grade-Way Const. v. U.S.*, 7 Cl. Ct. 263, 271 (Cl. Ct. 1985). The *Christian* Doctrine should not be applied in ways that "[ignore] the original analysis behind the Christian decision" or used "mechanically to incorporate any-and-all mandatory clauses into procurement contracts." William E. Slade, *A Question of Intent*, 7 FED. CIRCUIT B.J. 251, 255 (1997). To apply the *Christian* doctrine here, where the Executive Order and Regulations are recent and establish a new government procurement policy, would be inconsistent with the analysis of *Christian* and the doctrine that developed from that case. *See Appeal of Chamberlain Manufacturing Corporation*, 74-1 BCA 10,368, ASBCA No. 18,103 (1973) (refusing to apply the doctrine to an omitted clause regulating the management of government property because "[w]hile certainly not unimportant, nothing contained in the clause approaches the stature of a public procurement policy so as to require its incorporation into the contract by operation of law). Therefore, at this early stage in the Regulations' existence, 29 C.F.R. §9 is not yet deeply ingrained in the government's public procurement policy and cannot be applied by operation of law under the *Christian* Doctrine.

Further supporting this conclusion, the Supreme Court has held that the *Christian* Doctrine should not be applied in a private action where it is unclear whether the omitted provision is applicable to the disputed contract. *See Universities Research Assoc., Inc. v. Coutu*, 450 U.S. 754, 783 (1981). In the present case, Executive Order 12933 only applies to successor contracts for "similar work." At the time of the contract solicitation there was no case law interpreting "similar work". In fact, there is no such case law at the time this decision is being written, over one and a half years later, for this is the first litigated case at the Department of Labor brought under Executive Order 12933. Respondent believed that the Regulations did not apply to the contract, and GSA negotiated and proceeded in the early stages of the contract as if the Regulations did not apply (TR 329-33, 387-88; *see also infra*). The Regulations are sufficiently new that some confusion regarding their applicability is understandable. Further, GSA did not seek to make its modification retroactive. It would be wrong to read a provision into a contract where the Regulations' applicability was not readily apparent and the government agency did not apply it until after the time period in question.

b. Notice of the Regulations' Applicability

Alternatively, the Administrator contends that the Executive Order should apply because Respondent had both constructive and actual notice of its applicability. The Administrator points out that Respondent is an experienced government contractor, with over 30 current government contracts, and its employees in charge of the contract with GSA were either familiar with the Executive Order or had the responsibility to be familiar with the Executive Order (TR 310-11,

408; GX 2, at 269-72). Further, the Complainants' union informed Respondent that the Executive Order applied within days of the contract's signing, and David informed Respondents about the right of first refusal in late September (TR 81-82, 241-43, 247-49).

Federal contractors are generally considered on notice of the meaning of government contract terms. *See General Builders Supply Co. v. United States*, 409 F.2d 246, 250-51 (Ct. Cl. 1969). However, sometimes ambiguities–terms "reasonably susceptible to more than one interpretation"–exist in government contracts. *See PBI Electric Corp. v. United States*, 17 Cl. Ct. 128, 132 (Cl. Ct. 1989) (citing *Sun Shipbuilding & Dry Dock Co. v. United States*, 393 F.2d 807 (Ct. Cl. 1968)). If an ambiguity exists in a contract, a government contractor may be required to clarify it, depending on whether the ambiguity is patent or latent. *See PBI Electric Corp*, 17 Cl. Ct. at 132. A patent ambiguity is one that is "'glaring' . . . 'obvious' . . . 'gross,'" and "found in 'facially inconsistent provisions'" of a solicitation or contract. *See P.R. Burke Corp. v. United States*, 47 Fed. Cl. 340, 352 (Fed. Cl. 2000) (citations omitted). If a patent ambiguity exists, the contractor has the duty to inquire into the meaning of the term, or the issue will be decided against it in a court of law. *See P.R. Burke*, 47 Fed. Cl. at 351; *PBI Electric Corp.*, 17 Cl. Ct. at 132 (citing *Fort Vancouver Plywood Co. v. United States*, 860 F.2d 409 (Fed. Cir. 1988). If a latent ambiguity exists, the government contractor has no such responsibility. Whether an ambiguity is patent is a question of law to be decided on a case by case basis. *See P.R. Burke*, 47 Fed. Cl. at 352 (citing *Interstate Gen. Gov't. Contractors, Inc. v. Stone*, 980 F.2d 1433 (Fed. Cir. 1992)). In addition, if the contractor has actual notice of a contract ambiguity, whether patent or latent, it must clarify the ambiguity or have the issue decided against it in a court of law. *See P.R. Burke Corp.*, 47 Fed. Cl. at 352 (citing *Solar Turbines Int'l v. United States*, 3 Cl. Ct. 489 (Cl. Ct. 1983)).

In the present case, the Administrator argues that Respondent had actual notice when the Complainants' union representative and lawyer informed Respondent that the Executive Order applied, and had constructive notice of the Executive Order's application because the contract's ambiguity was obvious and Respondent had the duty to inquire regarding the ambiguity. The Administrator's arguments fail for several reasons.

The Administrator's claim that since the union informed Respondent of the applicability of the Executive Order, the Executive Order must apply, does not function as actual notice of the Regulations' application. The union's contention that the Executive Order applied was nothing more than an expression of its opinion. Respondent was entitled to reject the union's contention because GSA proceeded as if the Executive Order did not apply. The union should have notified GSA, not the Respondent, that the contract did not incorporate the Executive Order, thus providing GSA with the opportunity to amend the contract before Respondent made its hiring decisions.

The interactions between GSA and Respondent in the negotiations and early stages of the contract indicated that neither gave any consideration to the Executive Order. The parties' actions are significant because the purpose of the duty to inquire is to "ensure, to the greatest

extent possible, that all parties bidding on a contract share a common understanding of the scope of the project." *Triax Pacific, Inc. v. West*, 130 F.3d 1469, 1475 (Fed. Cir. 1997). GSA's solicitation noted that "the intent of this contract is to use a different approach" from its previous contract with Fluidics, and in fact there were differences between the two contracts (GX 2, at 13; TR 217-18, 319, 335-36). GSA did not incorporate the Executive Order or applicable regulations in its solicitation. In answering the solicitation, Respondent included several provisions that indicated its belief that the right of first refusal did not apply. Respondent specifically informed GSA that it would "only select employees from the incumbent staff that have been providing *exceptional support*," and would "*consider* the incumbent staff in our search to provide the *best qualified* staff for the project" (GX 2, at 144, 241) (emphasis added). This approach is inconsistent with offering a right of first refusal to employees who "perform suitably." 29 C.F.R. §9.8(b)(2) (1997). GSA never indicated that Respondent's proposal was inconsistent with its obligations under the Executive Order, but instead awarded it the contract aware of Respondent's goal of only hiring the most qualified workers and knowing that Respondent might not hire the incumbent staff (TR 221-22, 332-33). Thus, neither contracting party appeared to believe that the Executive Order applied.

Given that GSA failed to incorporate the new Regulations into the contract and proceeded as if the Executive Order did not apply, as well as that there were fundamental differences between the predecessor and successor contracts, Respondent's belief that the Executive Order did not apply was not unreasonable. Thus, Respondent was not on actual notice of the Executive Order's application.

The Administrator also argues that, even if Respondent was not on actual notice, it was on constructive notice of the Regulations' application because "a government contractor has an affirmative obligation to comply [with regulations]." *See Wage and Hour Administrator's Post-Hearing Brief* at 27.[9] As noted previously, a government contractor is charged with resolving patent ambiguities in its contracts, even if the contractor is not actually aware of the ambiguities; if the ambiguity is patent, the contractor is on constructive notice and has an affirmative duty to inquire into the meaning of the ambiguous language. *See P.R. Burke*, 47 Fed. Cl. at 352.

The Administrator argues that, because the contract contained provisions required by the

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[9] The Administrator relies on *Herman v. Nationwide Industrial Services*, ARB Case No. 98-081 (Nov. 24, 1999); *Florida Transp. Serv. Inc.*, BSCA Case No. 92-03 (Aug. 31, 1992); and *Elaine's Cleaning Service*, BSCA Case No. 92-07 (Aug. 13, 1992), to support this contention. All of these cases arise under the McNamara-O'Hara Service Contract Act of 1965, 41 U.S.C. §§ 351 *et seq.* ("SCA"). The SCA regulations specifically provide that "a federal contractor is under an 'affirmative obligation to ensure that its pay practices are in compliance with the SCA, and cannot itself resolve questions which arise, but must seek advice from the Department of Labor.'" *Herman v. Nationwide Industrial Services*, ARB No. 98-081 (Nov. 24, 1999) (citing 29 C.F.R. 4.188(b)(4)). The Regulations at issue contain no such specific requirement regarding the Executive Order's coverage.

McNamara-O'Hara Service Contract Act, 41 U.S.C. §§351 *et. seq.* ("SCA"), the Respondent should have known that the contract was also subject to the Executive Order. But the SCA provisions incorporated into the Byrne/Green Complex maintenance contract (GX 2, at 58-67) create no such inference. They do establish that the SCA generally applies to the contract, something that Respondent has not contested. But in regard to the issue that is being contested here – whether Respondent's contract for maintenance services at the Byrne/Green Complex is a successor contract for similar services – the incorporated SCA provisions provide no guidance.

Subparagraph (f) of the SCA regulation excerpts incorporated into the contract begins: "*If* this contract succeeds a contract subject to the Act under which substantially the same services were furnished" then its service employees must be paid at least as much as they would have received under a collective bargaining agreement applicable under the predecessor contract (GX 2, at 61) (emphasis added). This subparagraph clearly does not state that this is a successor contract for the same services; it simply states that if this is such a contract, then certain wage requirements apply.[10] Therefore, the SCA regulations incorporated into the Byrne/Green Complex contract would not have put Respondent on constructive notice that Executive Order 12933 also applied to that contract.

For the foregoing reasons, the Executive Order cannot be applied to the contract prior to the date of modification.

2. Reasonableness of Respondent's Belief Under Executive Order

Although my conclusion that the Executive Order did not apply to Respondent's contract prior to October 21, 1999 is dispositive, Respondent's decision not to retain the Eddises does not violate the Executive Order in any event. Section 9.8 of the Regulations explains when a successor contractor must offer a right a first refusal and when it may withhold such an offer. That section provides:

> The successor contractor must presume that all employees working under the predecessor contract in the last month of performance performed suitable work on the contract. However, a successor contractor is not required to offer a right of first refusal to an employee of the predecessor contractor if the successor contractor is able to demonstrate its *reasonable belief* that the employee in fact failed to perform suitably on the predecessor contract–for example, through evidence of disciplinary action taken for poor performance or evidence directly from the contracting agency that the particular employee did not perform suitably. The successor contractor must

[10] Compare subparagraph (f) to subparagraph (c), entitled "Compensation," which applies without qualification to "each service employee employed in the performance of this contract . . . ." (GX 2, at 58).

> demonstrate that *its belief* that an employee has failed to perform suitably on the predecessor contract is reasonable and based upon credible information provided by a knowledgeable source such as the predecessor contractor, the employee's supervisor, or the contracting agency. Information regarding the general performance of the predecessor contractor is not sufficient.

29 C.F.R. §9.8(b)(2) (1997) (emphasis added). Thus, a successor must only offer work to competent workers. If it chooses not to offer employment to a particular worker, its decision must be based on specific information from credible sources regarding the employee's past performance sufficient to rebut the presumption that the employee's work was suitable. It is important to note that when reviewing a successor contractor's decision, the standard is not whether the employee *in fact* performed suitably, but whether the successor contractor *reasonably believed* that the employee failed to perform suitably.

The Administrator asserts that Respondent cannot demonstrate that it had a reasonable belief that the Complainants did not perform suitably, and that Respondent did not rely on the factors set forth by the Regulations to determine whether the employees performed suitably.[11] Respondent maintains that it reasonably believed that the Complainants did not perform suitably when it decided not to offer them employment and that its decision-making process was consistent with the Regulations.

The Administrator argues that the Complainants had performed suitably under the contract, and that Respondent had no reasonable basis to believe otherwise; and if the issue were whether the Eddises performed suitably under the predecessor contract, based on the evidence before me in late 2000 and early 2001 I would find that, despite some problems, they did perform suitably. The evidence regarding their performance under the Fluidics contract is mixed. But Mr. Davis's singling out the Eddises for criticism in regard to their use of vacation days appears unjustified. Moreover, although David Eddis may have had an attitude problem since giving up his lead engineer position, it does not seem to have affected the quality of his work according to several knowledgeable sources.

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[11] The Administrator also argues that Respondent was required to offer employment "for positions in which employees are qualified" and that the Complainants are qualified service employees. 29 C.F.R. § 9.6(a) (1997). Although at the hearing Respondent presented evidence that the Complainants were not qualified, it did not argue this point in its post-hearing brief (TR 397, 435-42, 539); and for the purposes of this decision, it is presumed that the Complainants, both of whom are licensed engineers, met the qualifications for their positions. But the question of whether the Complainants were qualified is a different issue than whether they performed suitably under the predecessor contract. A worker's qualifications could certainly affect his performance, but simply because a worker is qualified does not mean that he performed suitably. The focus under the Regulations is on a worker's performance, and my analysis reflects this.

However, the issue is not whether David and Gerald Eddis actually performed suitably under the predecessor contract; the issue is whether Respondent, in September, 1999, *reasonably believed* they had not performed suitably. Thus the evidence to consider is that which was available to the Respondent at the time it decided not to hire the Eddises, not the evidence produced at the hearing regarding their performance under the Fluidics contract.

The Administrator asserts that Respondent made its decision not to hire the Eddises based on sources that are improper under the Regulations. Respondent based its hiring decisions on a combination of factors, including the post-award conference, conversations with GSA personnel, conversations with Mr. Davis, personnel resumes, interviews, and a test (TR 422, 429-30, 523-24). The parties specifically dispute whether Respondent was entitled to rely on Mr. Fee's post-award conference notes, Mr. Davis's statements, and the interviews and tests in making their hiring decisions.

The post-award meeting was held in part to get input from GSA on the incumbent staff. At the time of the meeting, Mr. Fee did not know any of the GSA personnel, and knew nothing about the existing Fluidics staff (392). He did not even know any of the incumbent staff's names (TR 392). During the meeting, Mr. Fee took notes on GSA personnel's comments on the incumbent workers (TR 391; RX 10). His notes included statements that David had a poor attitude and that Gerald had significant attendance problems (RX 10). His notes also indicated that he heard more negative remarks about David than he did positive remarks, and that he heard equal negative and positive remarks about Gerald (TR 396-97). At the conclusion of the meeting, Mr. Fee believed that the Complainants had probably not performed suitably, based on the GSA personnel's comments (TR 398).

The Administrator points out that Ms. Peek did not recall hearing negative comments about the Complainants at the meeting. However, Ms. Peek admitted that her memory was fallible and she did not pay close attention at the meeting. Moreover, there is no contention that Mr. Fee's notes of the meeting were fabricated or did not reflect what he heard, or that Mr. Fee had reason to be biased against the Complainants, as he had never met them and knew nothing about them going into the meeting. Therefore, I find that it was reasonable for Respondent to rely on the information obtained at the meeting by Mr. Fee. He based his opinion on relatively specific information provided by building managers, inspectors, and other GSA personnel who had worked with the predecessor contractor and its employees. The Regulations specifically allow a successor contractor to base its decisions on information provided by the contracting agency. *See* 29 C.F.R. §9.8(b)(2) (1997).

The Respondent also relied heavily on Mr. Davis's statements. Mr. Davis was the project manager on the Fluidics contract, and the Complainants worked under him. Mr. Davis told Respondent's employees that the Complainants abused their leave and often failed to complete their assignments (TR 433, 539-40). He also stated that the manager before him felt the Complainants had a poor work ethic (TR 540). Mr. Davis sincerely believed that the Complainants had not performed suitably. For example, Mr. Fritz admitted that the former project

manager had complained to him about the Eddises, and that Mr. Davis had expressed a concern to him that the Eddises were missing too much work (291-94). Mr. Fritz also testified that he felt Mr. Davis was honest and truthful, and that he did not think Mr. Davis had a personal grudge against the Complainants (TR 290, 293-94). Therefore, Mr. Davis had no discernable animus toward the Complainants, and there is no reason to believe that the information he provided to Respondent was anything other than his honest opinion.

The Administrator contends that Respondent should not have relied on Mr. Davis's statements without seeking verification. However, it should be noted that few, if any, employees are in a better position to provide information about a worker's performance than the project manager. Fluidics had only seven maintenance employees at the Byrne/Green Complex, so Mr. Davis would be expected to have knowledge of the Complainants' work performance. In fact, Mr. Carbone stated that he sought the project manager's advice because Mr. Davis had "knowledge and expertise of the work and the workers" and "was in a position where he could speak freely of who to hire and who to let go" (TR 432). Further, the issue is not whether Mr. Davis had formed an entirely fair opinion of the Complainants, but whether it was reasonable for the Respondent to rely on his opinion. Mr. Davis's information only supported what GSA employees had already told the Respondent . The Respondent needed to seek no further verification than that. Moreover, Respondent obliviously had confidence in Mr. Davis, since they hired him to work on another contract after he left Fluidics' employ. I find that it was reasonable for the Respondent to rely on the project manager's statements because he was in an ideal position to comment on the Complainants' performance and his information supported what the Respondent had already heard about the Complainants from GSA employees during the post-award conference.

The Regulations specifically allow a successor contractor to base its decisions on information provided by the predecessor contractor and the employee's supervisor. *See* 29 C.F.R. §9.8(b)(2) (1997). The negative information regarding the Complainants that the Respondent received from GSA representatives and Mr. Davis was sufficient for the Respondent to have reasonably concluded that the Complainants had not performed suitably on the job and should not be retained. It was sufficient to rebut the presumption that employees working on the predecessor contract performed suitable work.

In addition, the Respondent conducted interviews and tested the incumbent employees before offering them employment. By the time the interviews and tests were conducted, the Respondent already had a negative impression regarding the Complainants, so they could only have helped the Complainants' job prospects. The interviews appeared consistent with the §9.8 criteria for deciding whether to offer a right of first refusal. Mr. Carbone and the Complainants testified that the interviews covered the applicants' resume highlights, work histories, and job responsibilities (TR 77-79, 143-44, 435). All of these topics are related to the employees' past performance, and the interview process was helpful in determining past work performance. However, the test presents a problematic hiring device. The Respondent's employees explained that the test was designed to cover the general work that an operating engineer "*should* know in

order to perform duties in a facility *similar* to the Byrne/Green Complex" (TR 415) (emphasis added). The test was not prepared or scored with a knowledge or regard of how the particular equipment at the Byrne/Green Complex worked, and shed little, if any, light on the employees' past performance on the job (TR 497-508).[12] The Respondent should not have utilized the test in determining whether to offer the Complainants a right of first refusal. However, as established above, even without the test the Respondent had a reasonable basis to believe the Complainants had not performed satisfactorily under the predecessor contract.

Finally, and of great significance, the Administrator has not suggested any reason other than a belief that the Eddis brothers did not perform suitably on the previous contract for the Respondent's failure to offer a right of first refusal to them. In reaching its decision not to hire the Complainants, the Respondent had no personal animus against David or Gerald Eddis and had no reason to reject them except for cause. As stated above, the Respondent hired all of the other Fluidics employees. Further, it did not have replacements for the Eddises at hand. Instead, it hired replacements through newspaper advertisements. Clearly, since the Eddises were experienced workers familiar with the Byrne/Green Complex, if the Respondent believed they had performed suitably under the Fluidics contract it would have been efficacious to keep them on.

The Administrator seeks to place a nearly insurmountable burden on an employer who decides an incumbent employee has performed unsuitably. The Administrator argues that not only should the Respondent have obtained the opinions of the project manager and the GSA representatives, but that the Respondent had an obligation to also interview the Complainants' immediate supervisor and give the Complainants an opportunity to rebut the negative comments regarding their work on the predecessor contract. The Administrator does not address how the Respondent was supposed to accomplish all this in the short time between the awarding of the contract and the effective date of the contract. The contract was not awarded until August 27, 1999, barely a month before the contract was to take effect; the post-award conference was not held until early September; and the Respondent did not hire its project manager, Mr. Carbone, until ten days prior to the effective date of the contract. Under these conditions, hiring decisions had to be made with alacrity, and the Respondent acted reasonably based on the information available to it at the time. Had Mr. Davis's opinion been the only negative evidence of complainant's unsuitable performance, then perhaps the Respondent would have been obligated to obtain further evidence in order to rebut the presumption that all the employees on the predecessor contract performed suitable work. But Mr. Davis's opinion corroborated what Mr. Fee heard at the post-award conference from GSA representatives. Negative recommendations from the contracting agency and the project manager constitute sufficient investigation on the Respondent's part.

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[12] I will also note that, even if the test was a permissible method of evaluating employees under the Regulations, it is entitled to little weight, as it was scored inconsistently and inaccurately (TR 496-512). Accordingly, it would not have been reasonable for respondent to have relied on the test in determining whether Fluidics' employees performed suitably.

I find that the Respondent has demonstrated that its decision to not hire the Complainants was based on its reasonable belief that the Complainants failed to perform suitably on the predecessor contract. The Respondent's hiring decisions were not based on any one determining factor, but were the result of an ongoing process of investigation and discussions among Messrs. Carbone, Griffith, Fee, and Evans (TR 473, 481). While the test was a factor in the Respondent's decision, the Respondent almost certainly would have arrived at the same conclusion if the test was not utilized. Therefore, the Respondent's decision to not hire the Complainants was valid under the Executive Order and Regulations.

C. Conclusion

Executive Order 12933 serves the government's interest in a smooth contract turnover and provides service employees with job security. I do not underestimate the importance of Government contractors' full compliance with the Executive Order and the applicable Regulations. Still, in this case the government agency itself erroneously proceeded as if the Executive Order should not be applied to the contract, and the contractor followed suit. Since the Executive Order was not incorporated into the contract, and there is no basis to apply it to the contract by operation of law, the Executive Order did not apply to the contract at the time complainants were not hired by LB&B. GSA implemented the correct remedy when it modified the contract in late October 1999, and the Executive Order became part of the contract on that date.

Additionally, the Respondent's decision to not hire the Eddises was consistent with the Regulations. The Respondent underwent a hiring process in which it gathered information from a number of credible sources before making its final hiring decisions. Indeed, the Respondent's hiring procedure was quite thorough given its time restrictions, and completely devoid of the vague termination rationales, suspect sources of information, and decisions based on general contract performance that the Regulations warn against. Based on its investigation, the

Respondent reasonably believed that the Complainants had not performed suitably under the predecessor contract, and acted permissibly in not offering them employment.

ORDER

IT IS ORDERED that this case is dismissed.

JEFFREY TURECK
Administrative Law Judge